STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS SYLVAN CHAPTER 73,	)	
Charging Party,	)	Case No. S-CE-1246
v.	)	PERB Decision No. 780
SYLVAN UNION ELEMENTARY SCHOOL DISTRICT,	)	December 5, 1989
Respondent.	)	

Appearances: Nancy Brasmer, Field Representative, for California School Employees Association and its Sylvan Chapter 73; Pinnell & Kingsley by Ann M. Freers, Attorney, for Sylvan Union Elementary School District.

Before Hesse, Chairperson; Craib and Camilli, Members.

DECISION

HESSE, Chairperson: This case is before the Public Employment Relations Board (Board) on appeal by the California School Employees Association and its Sylvan Chapter 73 (Association) of a Board agent's dismissal (attached hereto) of its charge that the Sylvan Union Elementary School District (District) violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act by: (1) unilaterally eliminating instructional aide positions; (2) refusing to negotiate the effects of its layoff of instructional aides; and (3) transferring bargaining unit work to non-bargaining unit employees. We have reviewed the Board agent's dismissal, the Association's appeal, and the District's response, and affirm the dismissal in accordance with the discussion below.

The Association's allegation that the District's conduct constituted a unilateral action when it "negotiate[d] with school site advisory councils regarding the elimination of Instructional Aide positions" was properly dismissed by the Board agent as there were no facts presented that the District negotiated with the school site advisory councils.[1] The unfair practice charge states only that the District discussed the layoff of the instructional aides and hiring of supplemental teachers with the school site advisory councils, and that the District's curriculum coordinator recommended that the proposals submitted by the school site advisory council be implemented.

In dismissing the allegation that the District refused to negotiate over the effects of its layoff of instructional aides, the Board agent noted that the collective bargaining agreement between the District and Association contained an extensive provision addressing the effects of a layoff. (Article XVI.) The Board has held that neither party has a duty to negotiate over a matter covered by the express terms of an existing collective bargaining agreement. (See, e.g., Placentia Unified School District (1986) PERB Decision No. 595.) Thus, the District had no duty to negotiate over those matters covered by the layoff provision of the parties' collective bargaining agreement.

[1]In its appeal of the dismissal, the Association does not address the Board agent's dismissal of this allegation regarding the school site advisory councils.

The Association also alleged that its request to bargain the effects of the layoff included effects not covered by the layoff provision of the collective bargaining agreement. Even assuming this allegation is true, the Board nonetheless finds that this allegation was properly dismissed. In addition to the layoff provision, the collective bargaining agreement contained a zipper clause (Article XVI), wherein the parties mutually waived the right to meet and negotiate on all matters within the scope of representation during the term of the collective bargaining agreement. This provision afforded both parties the right to refuse to negotiate changes in the status quo as to negotiable terms and conditions of employment during the term of the agreement, whether such terms and conditions were established by contract or past practice. The provision covers all negotiable subjects, even if they were not within the contemplation of the parties at the time they negotiated the agreement. (Los Rios Community College District. (1988) PERB Decision No. 684.) Consistent with the Board's decision in Los Rios, the Board concludes that the parties waived any duty to bargain the effects of the layoff not covered by the collective bargaining agreement. Furthermore, the Association has not alleged that the District's implementation of the layoffs constituted a change in past practice. Accordingly, the Board agent properly dismissed this allegation.

As to the Association's allegation that the District transferred bargaining unit work out of the unit, the Board finds

that the Association has failed to present any facts supporting its allegation. In Eureka City School District (1985) PERB Decision No. 481, the Board established the test for proving an unlawful transfer of bargaining unit work. Specifically, the Board stated that:

> . . . the charging party must establish, as a threshold matter, that duties were, in fact, transferred out of the unit; that is, that unit employees ceased to perform work which they had previously performed or that nonunit employees began to perform duties previously performed exclusively by unit members. . . . (Id. at p. 15; emphasis in original.)

In its unfair practice charge, the Association simply states that the District posted a District-wide notice of employment for supplemental teachers to replace laid-off instructional aides. Without facts establishing that the duties were actually transferred out of the bargaining unit, the Association's allegation does not state a prima facie case.

ORDER

For the foregoing reasons, the unfair practice charge in Case No. S-CE-1246 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Craib and Camilli joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
(916) 322-3198

April 28, 1989

Nancy Brasmer, Field Representative
California School Employees Association
1240 North Main Street, Suite 194
Manteca, CA 95336

Re: California School Employees Association, Chapter 73 v. Sylvan Union School District, Unfair Practice Case No. S-CE-1246

Dear Ms. Brasmer:

The above-referenced charge alleges that Sylvan Union School District violated Government Code section 3543:5(c) by unilaterally eliminating instructional aide positions, by refusing to negotiate effects of the layoff of instructional aides, and by transferring bargaining unit work to nonbargaining unit employees.

I indicated to you in my attached letter dated April 14, 1989 that the above-referenced charge did not state a prima facie case. You were advised that if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, you should amend the charge accordingly. You were further advised that unless you amended the charge to state a prima facie case, or withdrew it prior to April 21, 1989, the charge would be dismissed.

I have not received either a request for withdrawal or an amended charge. I am therefore dismissing the charge based on the facts and reasons contained in my April 14, 1989 letter.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, you may obtain a review of this dismissal of the charge by filing an

appeal to the Board itself within twenty (20) calendar days after service of this dismissal (California Administrative Code, title 8, section 32635(a)). To be timely filed, the original and five copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing (California Administrative Code, title 8, section 32135). Code of Civil Procedure section 1013 shall apply. The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

If you file a timely appeal of the refusal to issue a complaint, any other party may file **with the Board an** original and five copies of a statement **in opposition within twenty calendar** days following the date of **service of the appeal (California** Administrative Code, **title 8, section 32635(b)).**

Service

All documents **authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See California Administrative Code,** title **8,** section **32140 for the required contents and a sample** form.**)** The document **will be considered properly "served" when** personally delivered **or deposited in the first-class** mail postage paid and properly **addressed.**

Extension of Time

A request for an extension of time in which to file a document with the Board itself must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party (California Administrative Code, title 8, section 32132).

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

CHRISTINE A. BOLOGNA
General Counsel

By
Bernard McMonigle
Staff Attorney

Attachment

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
(916) 322-3198

April 14, 1989

Nancy Brasmer, Field Representative
California School Employees Association
1240 North Main Street, Suite 194
Manteca, CA 95336

Re: California School Employees Association, Chapter 73 v. Sylvan Union School District, Case No. S-CE-1246 WARNING LETTER.

Dear Ms. Brasmer:

The above-referenced charge alleges that Sylvan Union School District violated Government **Code section** 3543.5(c) **by** unilaterally eliminating **instructional aide positions, by** refusing to negotiate **effects of the layoff of instructional aides, and** by **transferring bargaining unit work to nonbargaining** unit employees.

My investigation **revealed the following. The Sylvan Union School District has traditionally employed both instructional aides and supplemental teachers to work with elementary school children with remedial** needs **in such areas as reading, mathematics, and the** language **arts. Each elementary school was free to use instructional aides, supplemental teachers, or a mixture of both.** There was at least **one school in the district in each of** these categories. In mid-June **of 1988 the school site advisory** committees at Coleman **F. Brown and Sylvan Elementary** Schools made a recommendation, to the Board **of** Education, **for a** change in their Chapter 1 programs for the **1988-89** school **year.** This change would create a lack of work for instructional aides at the two schools. On June 29, 1988, the district board passed a resolution implementing the program change and directing that Chapter 1 instructional aides at the two schools be notified of their resulting layoff. July 21 the union met with the district representatives regarding the layoff. At that meeting, counsel for the District advised the union that the district was under no obligation to bargain over the effects of the layoff as the collective bargaining agreement covered the subject. On August 1 the union sent a bargaining proposal to the district over the effects of the layoff, which included subjects that were not covered by the collective bargaining agreement. To date the district takes the position that it is under no obligation to bargain over the effects of the layoff. On or about October 20, 1988, the district began the employment process for hiring

supplemental teachers to take over the work that had previously been performed by instructional aides at Coleman F. Brown and Sylvan Elementary Schools.

Based on the facts above this charge does not charge a prima facie violation of EERA for the reasons that follow. The first allegation is that it was an illegal unilateral action for the district to "negotiate with the school site advisory councils regarding the elimination of instructional aide positions." Under Grant Joint Union High School District (1983) PERB Decision No. 1976, to establish unilateral action, the charging party must establish that the employer breached or otherwise altered the parties' written agreement or its own established past practice. Investigation has revealed that school site advisory councils make only recommendations to the Board of Education regarding the conduct and design of programs within the schools. There is no negotiations between the councils, consisting of a cross-section of the school community, and the board. Further, no showing has been made that accepting the recommendation of the school site advisory council to eliminate instructional aide positions either alters the written agreement **of the parties or changes an** established past practice. **Therefore this allegation must be** dismissed.

Your second allegation is **that the district violated EERA when it** refused to negotiate over **the effects of the layoff of the** instructional aides. **My investigation reveals that the contract** between the parties contains **an extensive effects of layoff** clause, Article XVI in the **contract. In addition, Article XV,** titled "Miscellaneous," contains **what is traditionally** referred to as a zipper clause. In Los Rios Community College District (1988) PERB Decision No. 684 the Board reviewed the impact of zipper clauses. In that case the Board stated,

> Here, the zipper clause purports to mutually waive the right to negotiate over any "subject matter" for the term of the agreement, whether or not such subject or matter was "within the knowledge or contemplation" of the parties at the time the agreement was negotiated. There is no language which could be construed as limiting the effect of the clause as affording both parties the right to refuse to negotiate changes in the status quo as to otherwise negotiable terms and conditions of employment for the duration of the agreement (subject to

> reopener provisions), whether such terms and conditions are established by contract or by past practice.

The zipper clause in your agreement is similar to that described by the Board in Los Rios. Accordingly, this allegation must be dismissed.

Your last allegation was that the District Board violated EERA by transferring bargaining unit work out of the unit. In Eureka School District (1985) PERB Decision No. 481, the Board held that where unit and nonunit employees previously perform some overlap of the same duties the employer does not violate the duty to bargain by merely increasing the quantity of work that the nonunit employees perform. That is true even if the amount of work performed by unit employees is decreased. The Board further stated that, "in order to prevail in a unilateral transfer of work theory, the charging party must establish **as a** threshold matter that the duties were in fact transferred out of the unit; that is, unit employees ceased to perform work which they had previously performed **or** that **nonunit employees began to** perform duties previously performed **exclusively by** unit **employees."** You have indicated that the **work has traditionally been done** by unit and nonunit employees. **You have further indicated that** the District has maintained **at least one instructional aide** performing these duties. **Accordingly, under** Eureka School District, this allegation must **also be dismissed.**

For these reasons, the charge **as** presently written does not state a prima facie case. If there **are** any factual inaccuracies in this letter or any additional facts that would correct the deficiencies explained above, please amend the charge accordingly. The amended charge should be prepared on a standard PERB unfair practice charge form clearly labeled First Amended Charge. contain all the facts and allegations you wish to make, and must be signed under penalty of perjury by the charging party. The amended charge must be served on the respondent and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before April 21, 1989, I shall dismiss your charge. If you have any questions, please call me at (916) 322-3198.

Sincerely,

Bernard McMonigle
Staff Attorney